Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MARK KEVIN HICKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

At issue is whether a prosecution for making false statements under 18 U.S.C. § 1014 can be based on implied misrepresentations rather than expressly false assertions, and thus whether this Court's decision in *Williams v. United States*, 458 U.S. 279 (1982) can be narrowed to apply only to cases involving the passing of bad checks.

PARTIES

The parties to the proceeding below were Mark Kevin Hicks and the United States.

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ORDERS AND OPINIONS BELOW

The opinion of the Court of Appeals is reported at *United States v. Hicks*, 217 F.3d 1038 (9th Cir. 2000) is attached hereto as Appendix A. An order amending the opinion and denying a petition for rehearing is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 2000, and modified on July 31, 2000. The petition for rehearing also was denied on July 31, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 18 U.S.C. § 1014 provides that "whoever makes any false statement or report . . . for the purpose of influencing in any way . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation . . . , upon any application . . . , or loan . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

STATEMENT OF PROCEEDINGS

1. Procedural History

On April 13, 1998, the government filed a 10-count indictment charging petitioner Mark Kevin Hicks, together with Diana Hicks, Michael Coffey and Constance Coffey, with violations of 18 U.S.C. § 1014 (false statement in connection with a loan application). Mr. Hicks was charged in Counts 1-9. Petitioner's motion to dismiss the indictment based on *Williams v. United States*, 458 U.S. 279 (1982) was denied.

Petitioner was tried and convicted of all 9 counts. Following the denial of his motion for judgment of acquittal, he was sentenced to 33 months of incarceration and ordered to pay restitution. A timely notice of appeal from his conviction and sentence was filed in the Court of Appeals for the Ninth Circuit.

That Court, in the opinions cited above and appended hereto, affirmed the convictions, but reversed petitioner's sentence and remanded for re-sentencing.

2. Statement of Facts

After serving as a police officer for the City and County of San Francisco, petitioner entered the real estate business. He held a broker's license and was the sole owner of Hicks Realty, which provided real estate and consulting services. During the 1980's, petitioner generated significant income from commissions, rents and sales of appreciated investment properties.

Between 1988 and 1990, petitioner obtained nine loans from Glendale Federal Savings (Glendale). Each

loan was to fund petitioner's purchase of a particular piece of real property. Each loan package included an application and federal tax returns for the two preceding years.

The 1987 and 1989 tax returns provided to the lending institution ("Glendale returns") were not the same as those submitted to the Internal Revenue Service ("IRS returns").

At the suggestion of his regular tax preparer, petitioner had completed a different set of tax returns for Glendale. The income figures used for the Glendale returns were higher than those reported in the IRS returns.

The government presented no independent evidence that any entries in the Glendale returns were false. Rather, it proceeded on the theory that by submitting the Glendale returns in response to the bank's request for copies of his tax returns, petitioner implicitly made the false statement that the Glendale returns were copies of the 1040 forms actually filed with the IRS.

The loan application forms in this case made no explicit request for copies of the returns submitted to the IRS. Glendale's loan officer testified that the bank expected a loan applicant to provide copies of the IRS filed returns, but acknowledged that she did not know if this expectation was communicated to loan applicants. The tax preparer who completed both the Glendale and the IRS returns testified that he made no attempt to confirm the information he received as to any return he prepared.

A forensic accounting expert testified as to his reconstruction of petitioner's adjusted gross income for 1987 and 1989. Although he did not arrive at exact figures because available financial records were incomplete, the accountant was able to determine that petitioner did not overstate his income to Glendale. Rather, petitioner understated his income to the IRS.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT DECISION ERRONEOUSLY LIMITS *WILLIAMS V. UNITED STATES*, 458 U.S. 279 (1982) TO BAD CHECK CASES

A. The Ninth Circuit Holding On the *"Williams"* Issue

It was the government's initial contention and theory that petitioner's true income was reflected in the tax returns filed with the IRS, and that he had made false statements by showing inflated adjusted gross income figures on the returns he submitted to the bank. Petitioner attacked this theory both in pretrial motions and at trial, adducing evidence which established that his true adjusted gross income was accurately, or very nearly accurately, reflected in the Glendale 1040 forms, not the parallel IRS returns.

The government countered with a different theory, arguing to the court and jury that petitioner could be found guilty of making false statements on the basis of his implicit representation that the Glendale returns were the same as those submitted to the IRS, irrespective of

whether the income shown in the bank's returns was misstated.

Petitioner challenged the government's fallback theory, contending that under *Williams v. United States*, 458 U.S. 279 (1982) and *United States v. Waechter*, 771 F.2d 974 (6th Cir. 1985), the submission to the bank of tax returns that were merely different from the returns filed with the IRS is not actionable as a false statement under 18 U.S.C. § 1014, if the bank's returns are accurate as to material information.

Such returns would not fall within the category of express false statements as they contain no material misrepresentations. They would not meet the definition of implied false statements because there is no statute, regulation, policy or explicit instruction from the bank demanding the submission of the same returns as those provided to the IRS.

At most, the government showed that Glendale expected that petitioner, when asked for copies of his returns, would provide the same returns he had filed with the IRS. But, under *Williams* and *Waechter*, such unstated expectations or common understandings cannot support a conviction under § 1014.

The Ninth Circuit opinion rejects the application of *Williams* and *Waechter* to this case, seeking, contrary to the broad teachings of both these decisions, to limit *Williams* to prosecutions for passing bad checks.

Relying on this restrictive reading of *Williams*, the Circuit decision upholds petitioner's convictions based

solely on his act of "providing the Glendale returns at the time and in the manner that he did." 217 F.3d at 1043.

B. The Decision of the Court of Appeals is Erroneous and in Conflict with *Williams v. United States* and Applicable Circuit Opinions

In *Williams v. United States*, 458 U.S. 279, the Court reversed a conviction under 18 U.S.C. § 1014, holding that the petitioner's submission of numerous insufficient funds checks to banks did not amount to a false statement. Although a check is generally understood to represent that the drawer "currently has funds on deposit sufficient to cover the face value of the check," the Court concluded that a check, nevertheless, "did not . . . make any representation as to the state of the petitioner's bank account." 458 U.S. at 285-86. This conclusion rests on the sound observation that, "a check is not a factual assertion at all, and therefore cannot be characterized as true or false."

The Court further emphasized that "when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings.' " *Id.* at 286. See also, *United States v. Rothhammer*, 64 F.3d 554, 555-58 (10th Cir. 1995) (reversing conviction under § 1014 because a promise to pay in a promissory note is not a factual assertion regardless of the maker's intent).

An IRS form 1040 is a factual statement as to the taxpayer's income, deductions, credits, and taxes paid or owed. An income tax return that accurately reports this

information is true, not false. A return is not, by dint of any statute, regulation or legal convention, a factual assertion as to whether or not it was filed with the IRS. With respect to its filing status – as opposed to its contents – a return cannot logically be regarded as true or false.

The Ninth Circuit's decision obscures this fundamental distinction. The decision asserts that, by providing the Glendale returns "at the time and in the manner that he did," petitioner "directly (albeit through assertive conduct) stated" that the documents were copies of the 1987 and 1989 returns filed with the IRS.[1] 217 F.3d at 1043.

This analysis is plainly flawed and contrary to *Williams*. It could equally have been held in *Williams* that by presenting a genuine-looking check to the bank, the "check-kiter" directly, albeit through assertive conduct, stated that there were sufficient funds in the account to cover the check. But that is precisely the inference this Court declined to make.

Strikingly, the Court of Appeals opinion cites no authority from any Circuit to support its holding that the mere creation of a second tax return and its submission to a bank suffices for a conviction under § 1014. The concept of "direct" statement, upon which the decision relies, has no legal significance. It appears nowhere in the case law.

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[1] Fed.R.Evid. 801(a) defines a statement as an "(1) oral or written assertion or (2) nonverbal conduct, if intended as an assertion." The Rule, by its own terms, limits this definition to the hearsay context. *Id.*

Petitioner, in fact, is aware of no case which sustains a conviction under § 1014 absent proof of an actual material misrepresentation in the submitted document.[2] See, e.g., *United States v. Hord*, 6 F.3d 276, 285 (5th Cir. 1993)

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[2] With respect to the breadth of relevant conduct, the case law reflects a clear distinction between proof of bank fraud and proof of a § 1014 violation. For example, in *United States v. King*, 200 F.3d 1207 (9th Cir. 1999), the Ninth Circuit rejected a *Williams* challenge to a bank fraud conviction where the defendant made several false representations above and beyond the depositing of worthless checks into a bank account. The defendant also assured the personnel of the bank that the issuance of the checks had been a mistake and that he would cover the overdraft or issue new checks, knowing that he had no funds and the bank account on which the checks had been drawn was closed. 200 F.3d at 1218.

On the other hand, in *United States v. Cronic*, 900 F.2d 1511 (10th Cir. 1990), the Court of Appeals reversed a defendant's conviction of bank fraud based on *Williams*. In *Cronic*, the defendant ran two check kiting schemes by calculating each bank's processing time, charting checks and their locations, and timing the deposits of additional checks so as to avoid detection.

The Court held there was no authority for the proposition that the timing and orchestration of shifts in bank balances and deposits of checks constitutes a misrepresentation. *Id.* at 1512-13.

Moreover, unlike 18 U.S.C. § 1001, which, in addition to false statements, proscribes the use of tricks, schemes, or devices to obscure or falsify a material fact, § 1014 only prohibits the making of false statements or overvaluations of property. Cf. *Waechter*, 771 F.2d at 978.

As petitioner was not charged with violation of 18 U.S.C. §§ 1344 or 1001, his course of conduct in preparing the returns would not be germane to the question whether the returns themselves were true or false.

(emphasis added) ("*Williams* does not govern a situation in which *some information on the check*, such as a false signature, or a fictitious bank, *is itself a false statement.*").

The Circuit decision also seeks to limit *Williams* to offenses involving the deposit of bad checks. While the Circuit Court correctly notes that *Williams* rests, in part, on the conclusion that passing bad checks had nothing to do with the evils that Congress sought to prohibit in enacting § 1014, this Court's analysis of implied representations is more far-reaching.

United States v. Waechter, 771 F.2d 974, illustrates the analytical force of the *Williams* decision in non-check kiting cases. In *Waechter*, the defendant had manipulated the bidding process for HUD properties by submitting multiple bids for the same property under different names. *Id.* at 975-76. Because of HUD's system, which need not be described herein, this practice allowed the defendant to obtain the property for a price lower than the highest bid. *Id.* at 976. The defendant was convicted at trial of making a false statement under 18 U.S.C. § 1010 (false statement to HUD). The alleged false statement was the act of submitting multiple bids in a manner that did not reveal that the defendant controlled all the bids. *Id.* at 975.

On appeal the Sixth Circuit reversed, finding that the defendant had made no false statement as the term is used in § 1010. Relying on *Williams*, the Court emphasized that "[i]t is fundamental that a false statement is a 'factual assertion.' " The Court held, accordingly, that the government bore the burden to identify at least one bid placed with HUD on the defendant's behalf which

expressly or impliedly asserted a factual proposition that was provably false. *Id.* at 979.

As explained in *Waechter*, "a documentary factual assertion may be either express or implied."[3] *Id.* at 978. "An express factual assertion appears on the face of the document that asserts the factual proposition." *Id.* It may be either (1) an affirmative statement, or (2) an omission of information expressly sought by a document when combined with a signature certifying the completeness or truthfulness of the information provided in the document. *Id.*, (internal cites omitted).

An implied factual assertion does not appear on the face of the document. *Id.* Instead, "use of the document makes a factual assertion of those propositions that are necessarily implied by the system of statutes, regulations, and announced policies which created the document." *Id.* at 979.

Applying these definitions, the Sixth Circuit found that the bids placed on behalf of Waechter contained no express affirmative statements that were false and no express false omissions. *Id.* at 979. The Court further concluded that the defendant had made no implied false statements because, at the time he submitted the bids, HUD had no published policy prohibiting multiple bids; nor requiring disclosure of the fact that a person was using multiple d/b/a names to bid on properties. *Id.* at

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[3] The relevant legal dichotomy is "express" versus "implied"[statement]. "Direct" has no meaning in this analysis, except as a loose synonym for "express."

980. Absent such a policy, the Court held that the evidence did not support a finding that any of the bids at issue asserted an express or implied false statement to HUD. *Id.*

Notably, in contrast to the position of the Ninth Circuit, the Sixth Circuit did not hesitate to follow *Williams* although *Waechter* involved exactly the sort of misconduct – manipulation of the bid process – that falls within the core prohibitions of § 1010.

The analogy between this case and *Waechter* is manifest. The instant prosecution fails under *Waechter* because the government in this case (1) could not prove that the Glendale returns contained any facially false assertions or omissions; nor (2) could it point to any statute, regulation or announced policy which expressly obligates loan applicants to provide banks with the same returns they filed with the IRS. As in *Waechter*, this case involves a false impression, but not a false statement within the meaning of § 1014.

The Ninth Circuit decision endeavors to distinguish this case from *Waechter* on various grounds. The most basic distinction is that, unlike here, the defendant in *Waechter* made no express or implied false statement in submitting multiple bids to HUD because he in no way represented that he was not using agents to place bids on his own behalf. Yet, it cannot be disputed that the defendant in *Waechter* intended and, in fact, did mislead HUD as to the identity of the person(s) submitting the bids. In actuality, regardless of the name and other personal information on the bid, defendant was behind them all.

There is no comparable misrepresentation in the Glendale returns.[4] Nor, contrary to the Ninth Circuit decision, was petitioner on any greater notice than the defendant in *Waechter* as to the conventions governing the submitted documents. Glendale's loan application form did not specifically ask for copies of returns actually filed with the IRS. Glendale's loan officer acknowledged, moreover, that the bank's expectation as to the authenticity of returns was not communicated to loan applicants.

Surely, there would have been no prosecution had petitioner offered the bank "amended," albeit unfiled, returns which accurately reported his income and expenses for 1987 and 1989. Effectively, that is what occurred here. Petitioner submitted corrected tax returns to the bank which truthfully reflected his income. Under *Williams* and *Waechter*, his submission of these returns may not be prosecuted as a false statement under § 1014.

Williams stands for both the narrow, case-specific proposition that passing a check drawn on insufficient funds is not proscribed by § 1014, and the more general principal, with all its logical implications, that a false statement is a factual assertion that is subject to proof or disproof.

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[4] Like the names of the other supposedly independent bidders in *Waechter*, the use of the "taxpayer's copy" stamp may be suggestive and misleading, but it is not a false statement as defined by this Court.

The Ninth Circuit decision in this case seeks to limit *Williams'* reach solely to cases involving the deposit of insufficient fund checks. Other courts have applied *Williams* more broadly, building on its definition of false statement and the rule of strict construction of criminal statutes upon which that definition rests. This Court has not had previous occasion or cause to revisit *Williams*. The Ninth Circuit's unduly constricted reading of *Williams*, in conflict with *Waechter* and other Circuit decisions, is reason enough for the Court to reconsider the intended and proper reach of its decision.

CONCLUSION

Williams v. United States, 458 U.S. 279 (1982), as applied in *United States v. Waechter*, 771 F.2d 974 (6th Cir. 1985) and other Circuit cases, articulates a clear, comprehensive analytic framework for determining when an implied representation constitutes an actionable false statement.

The Ninth Circuit decision declines to follow *Williams*, suggesting that *Williams* is limited in its reach to cases involving bad checks. It substitutes for the analysis in *Williams* and *Waechter* a set of notions, such as "direct" statements and "assertive conduct," which reintroduce the exact sort of inconsistency and confusion that *Williams* sought to dispel.

It is not *Williams* that should be strictly construed, but rather, it is the criminal statute at issue, 18 U.S.C. § 1014, that must be given a narrow reading. *Dowling v. United States*, 473 U.S. 207, 216 (1985); *Williams*, 458 U.S.

at 290. Supreme Court guidance thus is necessary and critical to prevent the impermissible expansion of the scope of false statement statutes in reliance on the Ninth Circuit's erroneous decision in this case.

Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Mark Kevin Hicks

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARK KEVIN HICKS, *Defendant-Appellant.*	No. 99-10352 D.C. No. CR-98-00077-VRW OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
May 2, 2000 – San Francisco, California

Filed June 12, 2000

Before: Harlington Wood, Jr.,[1] Andrew J. Kleinfeld, and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

COUNSEL

Doron Weinberg and Nina Wilder, Weinberg & Wilder, San Francisco, California, for the defendant-appellant.

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[1] The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

John Hemann, Assistant United States Attorney, San Francisco, California, for the plaintiff-appellee.

OPINION

GRABER, Circuit Judge:

Defendant Mark Kevin Hicks was convicted by a jury of making false statements to a federally insured financial institution, in violation of 18 U.S.C. § 1014. On appeal, he contends that the evidence was insufficient to support his convictions, that the jury instructions were inadequate, that the district court erred in admitting certain evidence, and that the district court misapplied the Sentencing Guidelines. We affirm the judgment of conviction, but vacate the sentence and remand for further proceedings.

FACTS

We recount the relevant facts in the manner most favorable to the jury's verdict. Between 1988 and 1990, Defendant applied for nine loans from Glendale Federal Savings Bank (Glendale Federal).[2] Each loan was to fund Defendant's purchase of a particular piece of real property. Because he was self-employed, Defendant was required to submit copies of his last two federal income tax returns in support of each loan application. A bank officer explained at trial that "by a tax return, we mean a

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[2] In 1988 and 1989, Glendale Federal was a savings and loan association. In 1990, it became a savings bank. That change is not material to the issues on appeal.

complete set of 1040's that have been filed with the IRS [Internal Revenue Service]."

Concerned that his 1987 and 1989 tax returns reflected insufficient income to ensure approval of his various loan applications, Defendant asked his professional tax preparer to create different "tax returns" for those two years. The tax preparer took blank 1040 forms, filled in the total adjusted gross income amounts desired by Defendant for each of the two years, and then worked backward from those amounts to create real-looking tax forms for submission to Glendale Federal. Defendant, his wife, and the tax preparer each signed the completed forms, and the preparer stamped each form "Taxpayer's Copy." We refer to those documents as the "Glendale returns" to distinguish them from Defendant's actual tax returns that had been filed with the IRS.

Defendant submitted one of the two Glendale returns in connection with each of his loan applications, and the loans all were approved. Eventually, Defendant defaulted on all nine loans. After default, Glendale Federal foreclosed on the various loans. The foreclosure sales, conducted by a third party engaged by Glendale for that purpose, did not generate enough funds to repay fully the various loans at issue. Consequently, Glendale Federal lost hundreds of thousands of dollars on its loans to Defendant.

Based on his submission of the Glendale returns to Glendale Federal, Defendant was indicted on nine counts of making false statements to a federally insured financial institution, in violation of 18 U.S.C. § 1014. After being convicted by a jury, he was sentenced to 33 months of

incarceration and ordered to pay restitution. He timely appeals his conviction and sentence.

DISCUSSION

A. *Sufficiency of the Evidence*

Defendant first contends that the government failed to present evidence sufficient to prove that he made false statements to Glendale Federal. He also contends that the government failed to present evidence sufficient to prove that Glendale Federal was federally insured at the relevant times. We may reverse a jury's verdict due to insufficiency of the evidence only if, viewing the evidence presented at trial in the light most favorable to the prosecution, no rational juror could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979).

1. *False Statements*

At trial, Defendant conceded that the income figures contained in the Glendale returns were different than the income figures contained in his IRS-filed tax returns, but he attempted to prove that the figures in the Glendale returns reflected his "true" income. In other words, Defendant contended that, although he may have lied to the IRS, he did not lie to the bank and, therefore, could not be convicted of making false statements to a financial institution.

The government sought to prove at trial that Defendant made two sorts of false statements to Glendale Federal. First, the government contended that, by presenting

the Glendale returns in response to the bank's request for copies of two of his federal income tax returns, Defendant implicitly, and falsely, stated that the Glendale returns were copies of the actual 1040 forms that Defendant had filed with the IRS. Second, the government suggested that, in each of the nine loan applications at issue, Defendant falsely stated the amount of income that he derived from either rental payments or interest. The evidence presented at trial was sufficient to support the jury's verdict under both theories.

(a) *The Glendale returns were not copies of Defendant's actually filed IRS tax returns.*

The Glendale returns were IRS 1040s, signed by Defendant and his wife, and had been completed by a professional tax preparer and stamped "Taxpayer's Copy." The jury reasonably could have concluded that, by submitting those carefully prepared documents in response to the bank's request for Defendant's last two tax returns, Defendant falsely stated that the documents were copies of the tax forms that he had filed with the IRS.

Defendant does not dispute that the jury reasonably could have made such a finding. Instead, he contends that, as a matter of law, that finding is insufficient to support his convictions for violating § 1014. He relies on *Williams v. United States*, 458 U.S. 279 (1982), and *United States v. Waechter*, 771 F.2d 974 (6th Cir. 1985). Both cases are distinguishable.

In *Williams*, the Supreme Court considered whether knowingly depositing a check that is drawn on insufficient funds amounts to the making of a false statement for purposes of § 1014. The government argued in *Williams* that a depositor "is generally understood to represent" that she has sufficient funds on hand to cover every check that she writes, but the Court disagreed:

> [A] check is literally not a "statement" at all. . . . [W]hatever the general understanding of a check's function, "false statement" is not a term that, in common usage, is often applied to characterize "bad checks." And, when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable "understandings."

Williams, 458 U.S. at 285-86. Critical to the Court's holding was its conclusion, based on a lengthy analysis of the legislative history of § 1014, that "it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the deposit of bad checks." *Id.* at 290 (internal quotation marks omitted).

The distinctions between *Williams* and this case are fundamental. As noted above, the Supreme Court held in *Williams* that the defendant's act of depositing a check contained no implied representation concerning the state of the depositor's bank balance. Here, there is no similar implied representation. By providing the Glendale returns at the time and in the manner that he did, Defendant directly (albeit through assertive conduct) stated

that the documents were copies of his federal income tax returns for the two relevant years. That statement was false: The documents were not *copies* of anything, let alone copies of Defendant's federal income tax returns for the two years preceding his Glendale Federal loan applications. Instead, they were newly completed 1040 forms designed to *look like* copies of Defendant's federal income tax returns.[3]

Accordingly, the complex arguments considered by the Court in *Williams* simply do not bear on the much more straightforward facts of this case. This case would be analogous to *Williams* if Defendant had submitted genuine copies of his actual income tax returns, and the government's prosecution were based on a theory that those returns contained an implied representation that Defendant had paid the taxes showed as owing (when he had not paid).

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[3] This case does not require us to determine the precise definition of the term "return" under federal tax law. The cases and regulations make clear that, at a minimum, a document must have been presented to the IRS in "an honest and reasonable attempt to satisfy the requirements of the tax law" in order to qualify as a return. *Williams v. Commissioner*, 114 T.C. No. 8 (Mar. 1, 2000) (internal quotation marks omitted) (explaining the Tax Court's four-part test for determining whether a filing qualifies as a "return"). A bogus 1040 form that never was presented to the IRS serves no purpose under the tax law and does not qualify as a "return." *Cf. United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029, 1035 (6th Cir. 1999) ("We conclude that if a document purporting to be a tax return serves no purpose at all under the Internal Revenue Code, such a document cannot, as a matter of law, qualify as an honest and reasonable attempt to satisfy the requirements of the tax law. Therefore the document is not a 'return'. . . . ").

Moreover, a finding that Defendant falsely represented that the Glendale returns were the same returns that he had filed with the IRS need not be based on a subjective or generalized understanding of either loan applications or tax forms. Rather, the finding easily can be based on the particular course of conduct engaged in by Defendant, including his submission of the Glendale returns in response to the bank's request for copies of his last two tax returns and the tax preparer's use of a "Taxpayer's Copy" stamp.

Finally, the Supreme Court in *Williams* considered a prosecution theory that "would [have made] a surprisingly broad range of unremarkable conduct a violation of federal law." *Williams*, 458 U.S. at 286. In those circumstances, the Court concluded that the conduct at issue – passing bad checks – had nothing to do with the evils that Congress sought to prohibit when it enacted § 1014. By contrast, we deal here with "remarkable" conduct, and there is no risk that our holding will federally criminalize a vast array of everyday transactions. In fact, the very legislative history considered by the Court in *Williams* makes clear that Defendant's acts are exactly the sort of misconduct that Congress sought to criminalize by enacting § 1014: "[Section] 1014 was described [by Congress] as barring 'false statements or willful overvaluations in connection with applications, loans, and the like.' " *Williams*, 458 U.S. at 289 (quoting S. Rep. No. 1078, 88th Cong. 2d Sess. 1 (1964)).

Waechter is equally inapplicable. In that case, the defendant submitted multiple bids on properties owned by the Department of Housing and Urban Development. He used shills to make the bids, however, "in a manner

that did not reveal that [he] controlled all the bids." *Waechter*, 771 F.2d at 975. The government prosecuted the defendant under 18 U.S.C. § 1010, which prohibits making false statements to HUD. The government alleged that the false statement was "the false impression created by [the defendant's] concealment of his submission of multiple bids for a single property as an undisclosed princip[al]." *Id.* at 977 (internal quotation marks omitted).

The Sixth Circuit held that the defendant had made no false statement, because he neither expressly nor impliedly told HUD that he was not using agents to place bids on his behalf. Moreover, because no HUD policy or regulation prohibited the defendant from using shills, the defendant could not be convicted for falsely implying that he was submitting bids in compliance with HUD rules. *See id.* at 978-80. By contrast, here, there is no need to imply a requirement to submit a genuine tax return; Glendale Federal asked specifically for copies of his last two tax returns. *Waechter* would be analogous to this case only if HUD had employed a bid form stating "one bid per customer."

Thus, consistent with *Williams* and *Waechter*, the jury could have convicted Defendant based on his implicit statement that the Glendale returns were copies of his actually filed IRS tax returns.

(b) *In his loan applications, Defendant falsely stated the amount of rental income and interest income that he received each month.*

Defendant does not challenge the legal validity of this theory of liability. Instead, he argues that, based on

the evidence presented at trial, no rational juror could have found that he falsely stated the rental and interest income amounts. We disagree.

In two of the nine loan applications, Defendant reported that he had a monthly rental income loss of roughly $2,000. In the other seven applications, Defendant showed that he had no monthly rental income at all. Additionally, in seven of the applications, Defendant stated that he received $8,000 a month in interest income. The government contended at trial that all those figures were false.[4]

In support of that contention, the government submitted Defendant's actual tax returns for the relevant years, which reflected that Defendant reported to the IRS substantially higher rental income losses and substantially lower interest income than he reported to Glendale Federal. The IRS returns, of course, were signed under penalty of perjury. In addition, the government presented the testimony of Defendant's tax preparer, who explained how the actual tax returns were prepared; he testified that he believed that the IRS returns were "true and accurate reflection[s] of [Defendant's] income and expenses."

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[4] Defendant contends on appeal that the government "has all but conceded it could not prove that the Glendale returns contained any facially false assertions or omissions." That interpretation of the government's position is incorrect. The government conceded at trial that Defendant's expert witness was well qualified and that Defendant had committed tax fraud by understating his income to the IRS. It did not concede that the IRS returns were wholly false, nor that the Glendale returns were facially accurate.

Defendant countered with the expert testimony of a forensic accountant, who opined that the income figures in Defendant's loan applications and in the Glendale returns were more accurate than the income figures in Defendant's IRS tax returns. Accordingly, the evidence was in conflict on this point. However, evidence need not be undisputed to support a jury's verdict. The evidence in the record sufficed to support a jury finding that Defendant falsely stated to Glendale Federal his monthly rental income in each of the nine applications and falsely stated his interest income in seven of the nine applications. *See United States v. Nash*, 115 F.3d 1431 (9th Cir. 1997); *United States v. Darrah*, 119 F.3d 1322 (8th Cir. 1997).

2. *Federally Insured Status*

Defendant next contends that the government failed to prove that, at the time of the offenses in question, Glendale Federal was a federally insured financial institution covered by § 1014. We view the record differently.

A bank employee's "uncontradicted testimony of a bank's insured status can sufficiently support the jury's conclusion that this element was proven beyond a reasonable doubt." *United States v. Corbin*, 972 F.2d 271, 272 (9th Cir. 1992). The government presented the testimony of a bank officer who stated that Glendale Federal was federally insured at the relevant times. No evidence in the record contradicts the officer's testimony and, indeed, the testimony was corroborated by the certificates of insurance produced by the government. The evidence was sufficient to prove that, at the relevant times, Glendale Federal was federally insured.

B. *Adequacy of the Jury Instructions*

Defendant also argues that the district court erred in failing to define the terms "false" and "statement" for the jury. We review de novo whether the jury instructions accurately define the elements of a statutory offense and whether the jury instructions adequately cover a defendant's proffered defense. *See United States v. Gergen*, 172 F.3d 719, 724 (9th Cir. 1999); *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998). We review for abuse of discretion the district court's ultimate formulation of the instructions. *See United States v. Frega*, 179 F.3d 793, 806 n.16 (9th Cir. 1999). "The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented." *Id.*

At trial, Defendant requested a jury instruction defining the term "statement" as an "oral or written assertion of fact that can be characterized as 'true' or 'false.' " The government, on the other hand, requested an instruction telling the jury that, as a matter of law, submitting a tax return in support of a loan application is a "statement."

Defendant also requested an instruction defining "false":

> The word "false" means contrary to the truth. As used in the law, the word "false" generally means more than an innocent mistake or a simple error of fact. A statement is "false" if it was untrue when made and was then known to be untrue by the person making it or made with reckless indifference as to its truth or falsity.

The district court declined to give either party's requested instruction on the meaning of the term "statement," and the court similarly declined to give Defendant's requested instruction defining the term "false." Rather, the district court simply instructed the jury that the government was required to prove beyond a reasonable doubt that Defendant "made a false statement to Glendale." We find no error.

As an initial matter, the district court need not define common terms that are readily understandable by the jury. *See United States v. Dixon*, 201 F.3d 1223, 1231-32 (9th Cir. 2000) (holding that "the court did not err by failing to define 'commercial advantage' and 'private financial gain' because these are common terms, whose meanings are within the comprehension of the average juror"); *United States v. Moore*, 921 F.2d 207, 210 (9th Cir. 1990) (holding that, "[s]ince 'violence' is a concept within the jury's ordinary experience, there is no prejudice in failing to define it"); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1571-72 (9th Cir. 1989) (holding that, for purposes of a prosecution for a continuing criminal enterprise, the statutory terms "organizer," "supervisor," and "manager" "are neither outside the common understanding of a juror, nor so technical or ambiguous as to require a specific definition") (citation and internal quotation marks omitted).

Moreover, the instructions proffered by Defendant were not legally accurate. It simply is not correct that a "statement" must be "oral or written," as Defendant's own authority, *Waechter*, makes clear. *See Waechter*, 771 F.2d at 978 (stating that a factual assertion that is a false statement "may be either *express or implied.*") (emphasis

added). Similarly, it is not correct that a statement is "false" only if the person making the statement knows that it is false. A defendant's knowledge of falsity is a different issue than the fact of falsity, as the instructions given by the district court properly made clear.

Finally, the instructions ultimately given by the district court left ample room for the defense to proffer its theory of the case.[5] Nothing in the instructions foreclosed Defendant from presenting his chosen defense.

C. *Admissibility of Cardenas' Testimony*

Additionally, Defendant asserts that the district court erred in admitting the testimony of Alec Cardenas under

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[5] The district court defined the elements of the offense as follows:

> In order for [Defendant] to be found guilty of the offense charged, the government must prove each of the following elements beyond a reasonable doubt:
>
> (1) [Defendant] made a false statement to Glendale;
>
> (2) [Defendant] made the false statement to Glendale knowing it was false;
>
> (3) [Defendant] made the false statement for the purpose of influencing in any way the action of Glendale.
>
> . . . .
>
> For each count, it is not sufficient that some member of the jury agree that one statement is false while others of the jury agree that another statement is false. There must be at least one specific statement in each count that each of you agree is false and that each of you agree the defendant knew to be false.

Federal Rule of Evidence 404(b). We review the court's ruling for abuse of discretion. *See United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999).

Cardenas testified that Defendant reviewed his loan application and told Cardenas that he did not have enough income to qualify for a loan. To solve this problem, Defendant suggested that Cardenas consider whether he "knew anybody who had a business who could possibly assist [him by] stating [he] worked for them to show additional income." As a result of this conversation, Cardenas obtained from a friend a document that falsely showed that he had earned roughly $20,000 at the friend's business. According to Cardenas, Defendant also secretly loaned him $25,000 for a down payment and assisted him in concealing that information from the bank.

At the conclusion of Cardenas' testimony, the district court instructed the jury that it could not consider that testimony when determining whether Defendant had made a false statement to Glendale Federal. If, however, the jury concluded, based on other evidence, that Defendant had made a false statement, it could consider Cardenas' testimony when determining whether Defendant, by making that false statement, intended to influence the actions of Glendale Federal.[6] During closing

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[6] The district court gave the following limiting instruction:

> This testimony, as I am sure you observed, listening to it, does not relate to the transactions or events involved in the charges against the Defendant that I have outlined for you. And . . . you should not, therefore, consider this evidence in connection with

argument, the government properly stressed this same point.[7]

The district court did not abuse its discretion in admitting Cardenas' testimony for the limited purpose of proving Defendant's intention to influence the actions of Glendale Federal. Although Defendant argues on appeal that his intent was not contested during trial, the government was obligated to prove beyond a reasonable doubt that Defendant intended to influence the actions of the bank. In view of that valid, non-character purpose for which Cardenas' testimony was admitted, and in the light of the limiting instruction given and the government's responsible treatment of the evidence during closing argument, there was no error.

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deciding whether the Defendant committed the acts of which he stands accused in this case.

But if you find from other evidence, that is, evidence other than Cardenas' testimony, that the government has proved that the Defendant made false statements to Glendale Federal, then you may consider the Cardenas testimony as it bears on Defendant's intent to influence the action of Glendale Federal. But you may not consider Cardenas' testimony for any other purpose.

[7] The government argued:

The testimony of Alec Cardenas. It's not an important part of this case. And you have been instructed that the testimony of Alec Cardenas can only be considered by you after you have made decisions about whether the statements are true or false and whether they were knowingly made. Intent. It goes to intent.

The Defendant knowingly intended to do this.

D. *Sentencing Issues*

Under the Sentencing Guidelines, the base offense level for a violation of § 1014 is six. *See* U.S.S.G. § 2F1.1(a).[8] The district court determined that Glendale Federal had lost $659,326 in connection with Defendant's fraudulent activities and therefore increased the offense level by ten points under U.S.S.G. § 2F1.1(b)(1)(K). The district court further increased the offense level by two points because the offense involved more than minimal planning, *see* U.S.S.G. § 2F1.1(b)(2)(A), and by two points because Defendant was an "organizer, leader, manager, or supervisor" of another person during the commission of the offense, see U.S.S.G. § 3B1.1(c), resulting in a total adjusted offense level of 20. After declining to decrease the offense level based on Defendant's acceptance of responsibility, *see* U.S.S.G. § 3E1.1, the district court imposed the lowest possible sentence within the resulting Guideline range – 33 months.

Defendant contends that the district court erred in calculating the amount of loss caused by his offense, in increasing the offense level based on his supervision of the tax preparer, and in failing to reduce the offense level based on acceptance of responsibility. We review de novo

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[8] "Due to ex post facto considerations," the district court applied the 1990 Sentencing Guidelines, although Defendant was sentenced in 1999. Both parties concurred in that decision below, and neither party challenges the decision on appeal. Accordingly, we apply the same version of the Sentencing Guidelines, but express no view on the issue of what version of the Guidelines would apply here in the event of a dispute. All references in this opinion are to the 1990 version of the Guidelines.

the district court's interpretation of the Sentencing Guidelines, for clear error the district court's factual findings underlying the sentence imposed, and for abuse of discretion the district court's application of the Guidelines to a particular set of facts. *See United States v. Kohli*, 110 F.3d 1475, 1476-77 (9th Cir. 1997); *United States v. Barnes*, 125 F.3d 1287, 1290 (9th Cir. 1997).

1. *Amount of Loss*

"[I]n fraudulent loan application cases, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan." *United States v. Davoudi*, 172 F.3d 1130, 1135 (9th Cir. 1999) (internal quotation marks, ellipsis, and emphasis omitted). In this case, Glendale Federal recovered substantial amounts of the loaned funds by foreclosing on the loans and selling the properties that had been pledged as security. Nonetheless, Glendale Federal suffered large losses.

Defendant contends that the person whom the bank hired to sell the properties at issue engaged in criminal misconduct that resulted in the properties' being sold at unreasonably low prices. In other words, Defendant argues that the intervening criminal acts of the foreclosure agent inflated the amount of loss suffered by Glendale Federal and that he should not have been punished based on the inflated loss amount.

The district court declined to hear evidence or make findings relating to Defendant's claim that the foreclosure agent was a thief, concluding, as a matter of law, based

on our opinion in *Davoudi*, that the issue could be dealt with only through a motion for a downward departure. Further, because the court believed that the Guideline sentencing range that resulted from a consideration of Glendale Federal's total loss fairly reflected Defendant's culpability, it declined to depart downward on the basis of the foreclosure agent's alleged misconduct.

Davoudi does not control the question of intervening criminal misconduct, however. The defendant in that case did not claim that intervening criminal misconduct, unrelated in any manner to his own crime, inflated the losses suffered by the bank. Rather, in *Davoudi*, the defendant simply claimed that, because the assets at issue had decreased in value between the time his offense was discovered and the time the assets were sold, the district court should have used the higher pre-sale value when computing the loss suffered by the bank. We rejected his argument: "If the bank suffers losses after the offense is discovered because of a falling market or even through its own improvident management, those consequential losses can be attributed to the defendant's conduct for purposes of Guidelines sentencing." *Davoudi*, 172 F.3d at 1135.

Here, Defendant does not claim that the market fell, nor that the bank was improvident, nor even that the bank was grossly negligent. Rather, he contends that, after his crime was complete and fully discovered, a new criminal showed up and committed a different crime, inflicting new losses on the bank. As we understand Defendant's allegations, this case is no different than one in which, on the day of a planned foreclosure sale, an arsonist damages the bank's collateral.

The Guidelines' "relevant conduct" provision requires a defendant's sentence to be based on "all harm that resulted from the acts or omissions" of the defendant. U.S.S.G. § 1B1.3(a)(3). Like the other courts to consider this provision, we believe that the term "resulted from" establishes a causation requirement. *See United States v. Yeaman*, 194 F.3d 442, 457 (3d Cir. 1999) ("Section 1B1.3(a)(3) establishes a causation requirement when determining actual loss."); *United States v. Molina*, 106 F.3d 1118, 1123-24 (2d Cir. 1997) (holding that causation is established for purposes of U.S.S.G. § 1B1.3(a)(3) when the defendant "put into motion a chain of events that contained an inevitable tragic result" of the relevant harm) (internal quotation marks omitted); *United States v. Fox*, 999 F.2d 483, 486 (10th Cir. 1993) (holding that causation is established for purposes of § 1B1.3(a)(3) when the harm was a "direct result" or "flowed naturally" from the defendant's criminal misconduct); *see also United States v. Guillette*, 547 F.2d 743, 749 (2d Cir. 1976) ("We find the principle of proximate cause embodied in [18 U.S.C. § 241] through the phrase 'if death results.' ").

New losses inflicted independently by third-party criminals after the completion and discovery of a defendant's crime do not "result from" that crime for purposes of the Sentencing Guidelines, even if the defendant's conduct in some coincidental way was a but-for cause of the ultimate loss. *See generally* 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 3.12(c) & (f)(3) (1986 & Supp. 2000) (discussing proximate and intervening causes); *People v. Hernandez*, 624 N.E.2d 661, 666 (N.Y. 1993) ("When the intervening acts of another party are supervening or unforeseeable, the necessary

causal chain is broken, and there is no liability for the [original actor]."); *State v. Munoz*, 659 A.2d 683, 692 (Conn. 1995) ("The doctrine of intervening cause, which has deep roots in the law of proximate cause, both criminal and civil . . . refers to a situation in which the defendant's conduct is a 'but for' cause, or cause in fact, of the victim's injury, but nonetheless some other circumstance subsequently occurs – the source of which may be an act of the victim, the act of some other person, or some nonhuman force – that does more than supply a concurring or contributing cause of the injury, but is unforeseeable and sufficiently powerful in its effect that it serves to relieve the defendant of criminal responsibility for his conduct.") (citations and footnote omitted). *See also United States v. Marlatt*, 24 F.3d 1005, 1007 (7th Cir. 1994) ("[There is a] difference between 'but for' causation and the causation – for which the presence of but-for causation is ordinarily a necessary condition but rarely a sufficient one – that imposes legal liability. The distinction runs throughout the law. Criminal law is no exception."); *United States v. Spinney*, 795 F.2d 1410, 1415 (9th Cir. 1986) ("A basic tenet of criminal law is that the government must prove that the defendant's conduct was the legal or proximate cause of the resulting injury.").

The government does not quarrel with this basic principle, but suggests that the district court need not determine the causation issue as part of the initial loss calculation. Rather, in the government's view, after the victim's "actual loss" has been computed, a defendant may move for a downward departure on the basis that an unforeseeable intervening force has increased the loss for which the defendant is being sentenced. That approach is

flawed, however, because it improperly relieves the government of its obligation to prove by a preponderance of the evidence the amount of "harm that resulted from the acts or omissions" of the defendant. Under the Guidelines, the district court must determine the amount of loss caused by the defendant and the resultant Guidelines' sentencing range *before* considering whether to exercise its discretion to depart from that range. *See* U.S.S.G. § 1B1.1.

This case does not require us to define the outer boundaries of the Sentencing Guidelines' causation requirement. Our holding is a narrow one: For purposes of computing a fraud defendant's adjusted offense level under U.S.S.G. § 2F1.1, losses caused by the intervening, independent, and unforeseeable criminal misconduct of a third party do not "result[ ] from" the defendant's crime and may not be considered.

Because the district court heard no evidence and made no findings with respect to Defendant's allegations that the bank's losses were inflated by the intervening, independent, and unforeseeable criminal misconduct of the foreclosure agent, we are unable to determine whether Defendant's sentence comports with the principles discussed above. Accordingly, we must vacate the sentence and remand for findings concerning the amount of loss caused by Defendant's offenses. Because we vacate the sentence and remand on this basis, we do not consider Defendant's other challenges to the district court's determination of the amount of loss.[9]

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[9] The district court declined to resolve all the arguments presented by the parties concerning the appropriate items to be

2. *Other Adjustments*

Defendant also challenges the district court's decision to increase his offense level by two points because he was an "organizer, leader, manager, or supervisor" of the tax preparer who concocted the Glendale returns. U.S.S.G. § 3B1.1(c). We review for clear error, *see United States v. Tank*, 200 F.3d 627, 633 (9th Cir. 2000), and find none. The record amply supports the district court's finding that Defendant, at the very least, supervised the tax preparer in creating the Glendale returns.

Finally, Defendant contends that the district court erred in refusing to decrease his offense level by two points based on his acceptance of responsibility. We review for clear error, *United States v. Scrivener*, 189 F.3d 944, 947 (9th Cir. 1999), and again find none. Defendant presented a complex and elaborate defense, challenging both the legal validity of the government's theory of the case and his factual guilt. Although a defendant who goes to trial in order to challenge the legal validity of the government's theory may, in some cases, be eligible for a reduction of the offense level based on acceptance of responsibility, *see United States v. McKittrick*, 142 F.3d 1170, 1178 (9th Cir. 1998), the district court did not clearly err in concluding that this was not such a case.

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included in the loss calculation, because of the court's view that the sentencing range recommended by the presentence report "reasonably reflects the culpability of the Defendant in connection with these transactions." On remand, the district court should make specific findings as to the amount of loss before considering whether the resulting sentence accurately reflects Defendant's culpability.

CONCLUSION

We AFFIRM the judgment of conviction, but VACATE the sentence and REMAND for further sentencing proceedings consistent with this opinion.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARK KEVIN HICKS, *Defendant-Appellant.*	No. 99-10352 D.C. No. CR-98-00077-VRW ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
May 2, 2000 – San Francisco, California

Filed June 12, 2000

Amended July 31, 2000

Before: Harlington Wood, Jr.,[1] Andrew J. Kleinfeld, and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

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[1] The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

COUNSEL

Doron Weinberg and Nina Wilder, Weinberg & Wilder, San Francisco, California, for the defendant-appellant.

John Hemann, Assistant United States Attorney, San Francisco, California, for the plaintiff-appellee.

ORDER

The Opinion filed June 12, 2000, slip op. 6117, and appearing at 2000 WL 744077 (9th Cir. June 12, 2000), is amended as follows:

At slip op. 6126, at the end of the second sentence of the second full paragraph; 2000 WL 744077, at *2, at the end of the second sentence of the fifth full paragraph, insert the following footnote:

> Instead, he contends that, as a matter of law, that finding is insufficient to support his convictions for violating § 1014.[3] He relies on *Williams v. United States*. . . .
>
> > [3] We review de novo Defendant's claim that his convictions were based on a legally invalid interpretation of 18 U.S.C. § 1014. *See United States v. Sarkisian*, 197 F.3d 966, 984 (9th Cir. 1999) ("The district court's interpretation of a criminal statute and the scope of the conduct covered by the statute is a question of law reviewed de novo.").

With this amendment, the petition for rehearing is DENIED.

OPINION

GRABER, Circuit Judge:

Defendant Mark Kevin Hicks was convicted by a jury of making false statements to a federally insured financial institution, in violation of 18 U.S.C. § 1014. On appeal, he contends that the evidence was insufficient to support his convictions, that the jury instructions were inadequate, that the district court erred in admitting certain evidence, and that the district court misapplied the Sentencing Guidelines. We affirm the judgment of conviction, but vacate the sentence and remand for further proceedings.

FACTS

We recount the relevant facts in the manner most favorable to the jury's verdict. Between 1988 and 1990, Defendant applied for nine loans from Glendale Federal Savings Bank (Glendale Federal).[2] Each loan was to fund Defendant's purchase of a particular piece of real property. Because he was self-employed, Defendant was required to submit copies of his last two federal income tax returns in support of each loan application. A bank officer explained at trial that "by a tax return, we mean a complete set of 1040's that have been filed with the IRS [Internal Revenue Service]."

Concerned that his 1987 and 1989 tax returns reflected insufficient income to ensure approval of his

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[2] In 1988 and 1989, Glendale Federal was a savings and loan association. In 1990, it became a savings bank. That change is not material to the issues on appeal.

various loan applications, Defendant asked his professional tax preparer to create different "tax returns" for those two years. The tax preparer took blank 1040 forms, filled in the total adjusted gross income amounts desired by Defendant for each of the two years, and then worked backward from those amounts to create real-looking tax forms for submission to Glendale Federal. Defendant, his wife, and the tax preparer each signed the completed forms, and the preparer stamped each form "Taxpayer's Copy." We refer to those documents as the "Glendale returns" to distinguish them from Defendant's actual tax returns that had been filed with the IRS.

Defendant submitted one of the two Glendale returns in connection with each of his loan applications, and the loans all were approved. Eventually, Defendant defaulted on all nine loans. After default, Glendale Federal foreclosed on the various loans. The foreclosure sales, conducted by a third party engaged by Glendale for that purpose, did not generate enough funds to repay fully the various loans at issue. Consequently, Glendale Federal lost hundreds of thousands of dollars on its loans to Defendant.

Based on his submission of the Glendale returns to Glendale Federal, Defendant was indicted on nine counts of making false statements to a federally insured financial institution, in violation of 18 U.S.C. § 1014. After being convicted by a jury, he was sentenced to 33 months of incarceration and ordered to pay restitution. He timely appeals his conviction and sentence.

DISCUSSION

A. *Sufficiency of the Evidence*

Defendant first contends that the government failed to present evidence sufficient to prove that he made false statements to Glendale Federal. He also contends that the government failed to present evidence sufficient to prove that Glendale Federal was federally insured at the relevant times. We may reverse a jury's verdict due to insufficiency of the evidence only if, viewing the evidence presented at trial in the light most favorable to the prosecution, no rational juror could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979).

1. *False Statements*

At trial, Defendant conceded that the income figures contained in the Glendale returns were different than the income figures contained in his IRS-filed tax returns, but he attempted to prove that the figures in the Glendale returns reflected his "true" income. In other words, Defendant contended that, although he may have lied to the IRS, he did not lie to the bank and, therefore, could not be convicted of making false statements to a financial institution.

The government sought to prove at trial that Defendant made two sorts of false statements to Glendale Federal. First, the government contended that, by presenting the Glendale returns in response to the bank's request for copies of two of his federal income tax returns, Defendant implicitly, and falsely, stated that the Glendale returns

were copies of the actual 1040 forms that Defendant had filed with the IRS. Second, the government suggested that, in each of the nine loan applications at issue, Defendant falsely stated the amount of income that he derived from either rental payments or interest. The evidence presented at trial was sufficient to support the jury's verdict under both theories.

(a) *The Glendale returns were not copies of Defendant's actually filed IRS tax returns.*

The Glendale returns were IRS 1040s, signed by Defendant and his wife, and had been completed by a professional tax preparer and stamped "Taxpayer's Copy." The jury reasonably could have concluded that, by submitting those carefully prepared documents in response to the bank's request for Defendant's last two tax returns, Defendant falsely stated that the documents were copies of the tax forms that he had filed with the IRS.

Defendant does not dispute that the jury reasonably could have made such a finding. Instead, he contends that, as a matter of law, that finding is insufficient to support his convictions for violating § 1014.[3] He relies on *Williams v. United States*, 458 U.S. 279 (1982), and *United*

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[3] We review de novo Defendant's claim that his convictions were based on a legally invalid interpretation of 18 U.S.C. § 1014. *See United States v. Sarkisian*, 197 F.3d 966, 984 (9th Cir. 1999) ("The district court's interpretation of a criminal statute and the scope of the conduct covered by the statute is a question of law reviewed de novo.").

States v. Waechter, 771 F.2d 974 (6th Cir. 1985). Both cases are distinguishable.

In *Williams*, the Supreme Court considered whether knowingly depositing a check that is drawn on insufficient funds amounts to the making of a false statement for purposes of § 1014. The government argued in *Williams* that a depositor "is generally understood to represent" that she has sufficient funds on hand to cover every check that she writes, but the Court disagreed:

> [A] check is literally not a "statement" at all. . . . [W]hatever the general understanding of a check's function, "false statement" is not a term that, in common usage, is often applied to characterize "bad checks." And, when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable "understandings."

Williams, 458 U.S. at 285-86. Critical to the Court's holding was its conclusion, based on a lengthy analysis of the legislative history of § 1014, that "it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the deposit of bad checks." *Id.* at 290 (internal quotation marks omitted).

The distinctions between *Williams* and this case are fundamental. As noted above, the Supreme Court held in *Williams* that the defendant's act of depositing a check contained no implied representation concerning the state of the depositor's bank balance. Here, there is no similar implied representation. By providing the Glendale

returns at the time and in the manner that he did, Defendant directly (albeit through assertive conduct) stated that the documents were copies of his federal income tax returns for the two relevant years. That statement was false: The documents were not *copies* of anything, let alone copies of Defendant's federal income tax returns for the two years preceding his Glendale Federal loan applications. Instead, they were newly completed 1040 forms designed to *look like* copies of Defendant's federal income tax returns.[4]

Accordingly, the complex arguments considered by the Court in *Williams* simply do not bear on the much more straightforward facts of this case. This case would be analogous to *Williams* if Defendant had submitted genuine copies of his actual income tax returns, and the government's prosecution were based on a theory that those returns contained an implied representation that

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[4] This case does not require us to determine the precise definition of the term "return" under federal tax law. The cases and regulations make clear that, at a minimum, a document must have been presented to the IRS in "an honest and reasonable attempt to satisfy the requirements of the tax law" in order to qualify as a return. *Williams v. Commissioner*, 114 T.C. No. 8 (Mar. 1, 2000) (internal quotation marks omitted) (explaining the Tax Court's four-part test for determining whether a filing qualifies as a "return"). A bogus 1040 form that never was presented to the IRS serves no purpose under the tax law and does not qualify as a "return." *Cf. United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029, 1035 (6th Cir. 1999) ("We conclude that if a document purporting to be a tax return serves no purpose at all under the Internal Revenue Code, such a document cannot, as a matter of law, qualify as an honest and reasonable attempt to satisfy the requirements of the tax law. Therefore the document is not a 'return'. . . . ").

Defendant had paid the taxes showed as owing (when he had not paid).

Moreover, a finding that Defendant falsely represented that the Glendale returns were the same returns that he had filed with the IRS need not be based on a subjective or generalized understanding of either loan applications or tax forms. Rather, the finding easily can be based on the particular course of conduct engaged in by Defendant, including his submission of the Glendale returns in response to the bank's request for copies of his last two tax returns and the tax preparer's use of a "Taxpayer's Copy" stamp.

Finally, the Supreme Court in *Williams* considered a prosecution theory that "would [have made] a surprisingly broad range of unremarkable conduct a violation of federal law." *Williams*, 458 U.S. at 286. In those circumstances, the Court concluded that the conduct at issue – passing bad checks – had nothing to do with the evils that Congress sought to prohibit when it enacted § 1014. By contrast, we deal here with "remarkable" conduct, and there is no risk that our holding will federally criminalize a vast array of everyday transactions. In fact, the very legislative history considered by the Court in *Williams* makes clear that Defendant's acts are exactly the sort of misconduct that Congress sought to criminalize by enacting § 1014: "[Section] 1014 was described [by Congress] as barring 'false statements or willful overvaluations in connection with applications, loans, and the like.' " *Williams*, 458 U.S. at 289 (quoting S. Rep. No. 1078, 88th Cong. 2d Sess. 1 (1964)).

Waechter is equally inapplicable. In that case, the defendant submitted multiple bids on properties owned by the Department of Housing and Urban Development. He used shills to make the bids, however, "in a manner that did not reveal that [he] controlled all the bids." *Waechter*, 771 F.2d at 975. The government prosecuted the defendant under 18 U.S.C. § 1010, which prohibits making false statements to HUD. The government alleged that the false statement was "the false impression created by [the defendant's] concealment of his submission of multiple bids for a single property as an undisclosed princip[al]." *Id.* at 977 (internal quotation marks omitted).

The Sixth Circuit held that the defendant had made no false statement, because he neither expressly nor impliedly told HUD that he was not using agents to place bids on his behalf. Moreover, because no HUD policy or regulation prohibited the defendant from using shills, the defendant could not be convicted for falsely implying that he was submitting bids in compliance with HUD rules. *See id.* at 978-80. By contrast, here, there is no need to imply a requirement to submit a genuine tax return; Glendale Federal asked specifically for copies of his last two tax returns. *Waechter* would be analogous to this case only if HUD had employed a bid form stating "one bid per customer."

Thus, consistent with *Williams* and *Waechter*, the jury could have convicted Defendant based on his implicit statement that the Glendale returns were copies of his actually filed IRS tax returns.

(b) *In his loan applications, Defendant falsely stated the amount of rental income and interest income that he received each month.*

Defendant does not challenge the legal validity of this theory of liability. Instead, he argues that, based on the evidence presented at trial, no rational juror could have found that he falsely stated the rental and interest income amounts. We disagree.

In two of the nine loan applications, Defendant reported that he had a monthly rental income loss of roughly $2,000. In the other seven applications, Defendant showed that he had no monthly rental income at all. Additionally, in seven of the applications, Defendant stated that he received $8,000 a month in interest income. The government contended at trial that all those figures were false.[5]

In support of that contention, the government submitted Defendant's actual tax returns for the relevant years, which reflected that Defendant reported to the IRS substantially higher rental income losses and substantially lower interest income than he reported to Glendale Federal. The IRS returns, of course, were signed under

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[5] Defendant contends on appeal that the government "has all but conceded it could not prove that the Glendale returns contained any facially false assertions or omissions." That interpretation of the government's position is incorrect. The government conceded at trial that Defendant's expert witness was well qualified and that Defendant had committed tax fraud by understating his income to the IRS. It did not concede that the IRS returns were wholly false, nor that the Glendale returns were facially accurate.

penalty of perjury. In addition, the government presented the testimony of Defendant's tax preparer, who explained how the actual tax returns were prepared; he testified that he believed that the IRS returns were "true and accurate reflection[s] of [Defendant's] income and expenses."

Defendant countered with the expert testimony of a forensic accountant, who opined that the income figures in Defendant's loan applications and in the Glendale returns were more accurate than the income figures in Defendant's IRS tax returns. Accordingly, the evidence was in conflict on this point. However, evidence need not be undisputed to support a jury's verdict. The evidence in the record sufficed to support a jury finding that Defendant falsely stated to Glendale Federal his monthly rental income in each of the nine applications and falsely stated his interest income in seven of the nine applications. *See United States v. Nash*, 115 F.3d 1431 (9th Cir. 1997); *United States v. Darrah*, 119 F.3d 1322 (8th Cir. 1997).

2. *Federally Insured Status*

Defendant next contends that the government failed to prove that, at the time of the offenses in question, Glendale Federal was a federally insured financial institution covered by § 1014. We view the record differently.

A bank employee's "uncontradicted testimony of a bank's insured status can sufficiently support the jury's conclusion that this element was proven beyond a reasonable doubt." *United States v. Corbin*, 972 F.2d 271, 272 (9th Cir. 1992). The government presented the testimony of a

bank officer who stated that Glendale Federal was federally insured at the relevant times. No evidence in the record contradicts the officer's testimony and, indeed, the testimony was corroborated by the certificates of insurance produced by the government. The evidence was sufficient to prove that, at the relevant times, Glendale Federal was federally insured.

B. *Adequacy of the Jury Instructions*

Defendant also argues that the district court erred in failing to define the terms "false" and "statement" for the jury. We review de novo whether the jury instructions accurately define the elements of a statutory offense and whether the jury instructions adequately cover a defendant's proffered defense. *See United States v. Gergen*, 172 F.3d 719, 724 (9th Cir. 1999); *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998). We review for abuse of discretion the district court's ultimate formulation of the instructions. *See United States v. Frega*, 179 F.3d 793, 806 n.16 (9th Cir. 1999). "The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented." *Id.*

At trial, Defendant requested a jury instruction defining the term "statement" as an "oral or written assertion of fact that can be characterized as 'true' or 'false.' " The government, on the other hand, requested an instruction telling the jury that, as a matter of law, submitting a tax return in support of a loan application is a "statement."

Defendant also requested an instruction defining "false":

> The word "false" means contrary to the truth. As used in the law, the word "false" generally means more than an innocent mistake or a simple error of fact. A statement is "false" if it was untrue when made and was then known to be untrue by the person making it or made with reckless indifference as to its truth or falsity.

The district court declined to give either party's requested instruction on the meaning of the term "statement," and the court similarly declined to give Defendant's requested instruction defining the term "false." Rather, the district court simply instructed the jury that the government was required to prove beyond a reasonable doubt that Defendant "made a false statement to Glendale." We find no error.

As an initial matter, the district court need not define common terms that are readily understandable by the jury. *See United States v. Dixon*, 201 F.3d 1223, 1231-32 (9th Cir. 2000) (holding that "the court did not err by failing to define 'commercial advantage' and 'private financial gain' because these are common terms, whose meanings are within the comprehension of the average juror"); *United States v. Moore*, 921 F.2d 207, 210 (9th Cir. 1990) (holding that, "[s]ince 'violence' is a concept within the jury's ordinary experience, there is no prejudice in failing to define it"); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1571-72 (9th Cir. 1989) (holding that, for purposes of a prosecution for a continuing criminal enterprise, the statutory terms "organizer," "supervisor," and "manager" "are neither outside the common understanding of a juror, nor so technical or ambiguous as to require

a specific definition") (citation and internal quotation marks omitted).

Moreover, the instructions proffered by Defendant were not legally accurate. It simply is not correct that a "statement" must be "oral or written," as Defendant's own authority, *Waechter*, makes clear. *See Waechter*, 771 F.2d at 978 (stating that a factual assertion that is a false statement "may be either *express or implied.*") (emphasis added). Similarly, it is not correct that a statement is "false" only if the person making the statement knows that it is false. A defendant's knowledge of falsity is a different issue than the fact of falsity, as the instructions given by the district court properly made clear.

Finally, the instructions ultimately given by the district court left ample room for the defense to proffer its theory of the case.[6] Nothing in the instructions foreclosed Defendant from presenting his chosen defense.

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[6] The district court defined the elements of the offense as follows:

> In order for [Defendant] to be found guilty of the offense charged, the government must prove each of the following elements beyond a reasonable doubt:
>
> (1) [Defendant] made a false statement to Glendale;
>
> (2) [Defendant] made the false statement to Glendale knowing it was false;
>
> (3) [Defendant] made the false statement for the purpose of influencing in any way the action of Glendale.
>
> . . . .
>
> For each count, it is not sufficient that some member of the jury agree that one statement is false while others of the jury agree that another statement

C. *Admissibility of Cardenas' Testimony*

Additionally, Defendant asserts that the district court erred in admitting the testimony of Alec Cardenas under Federal Rule of Evidence 404(b). We review the court's ruling for abuse of discretion. *See United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999).

Cardenas testified that Defendant reviewed his loan application and told Cardenas that he did not have enough income to qualify for a loan. To solve this problem, Defendant suggested that Cardenas consider whether he "knew anybody who had a business who could possibly assist [him by] stating [he] worked for them to show additional income." As a result of this conversation, Cardenas obtained from a friend a document that falsely showed that he had earned roughly $20,000 at the friend's business. According to Cardenas, Defendant also secretly loaned him $25,000 for a down payment and assisted him in concealing that information from the bank.

At the conclusion of Cardenas' testimony, the district court instructed the jury that it could not consider that testimony when determining whether Defendant had made a false statement to Glendale Federal. If, however, the jury concluded, based on other evidence, that Defendant had made a false statement, it could consider

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is false. There must be at least one specific statement in each count that each of you agree is false and that each of you agree the defendant knew to be false.

Cardenas' testimony when determining whether Defendant, by making that false statement, intended to influence the actions of Glendale Federal.[7] During closing argument, the government properly stressed this same point.[8]

The district court did not abuse its discretion in admitting Cardenas' testimony for the limited purpose of proving Defendant's intention to influence the actions of Glendale Federal. Although Defendant argues on appeal

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[7] The district court gave the following limiting instruction:

> This testimony, as I am sure you observed, listening to it, does not relate to the transactions or events involved in the charges against the Defendant that I have outlined for you. And . . . you should not, therefore, consider this evidence in connection with deciding whether the Defendant committed the acts of which he stands accused in this case.
>
> But if you find from other evidence, that is, evidence other than Cardenas' testimony, that the government has proved that the Defendant made false statements to Glendale Federal, then you may consider the Cardenas testimony as it bears on Defendant's intent to influence the action of Glendale Federal. But you may not consider Cardenas' testimony for any other purpose.

[8] The government argued:

> The testimony of Alec Cardenas. It's not an important part of this case. And you have been instructed that the testimony of Alec Cardenas can only be considered by you after you have made decisions about whether the statements are true or false and whether they were knowingly made. Intent. It goes to intent.
>
> The Defendant knowingly intended to do this.

that his intent was not contested during trial, the government was obligated to prove beyond a reasonable doubt that Defendant intended to influence the actions of the bank. In view of that valid, non-character purpose for which Cardenas' testimony was admitted, and in the light of the limiting instruction given and the government's responsible treatment of the evidence during closing argument, there was no error.

D. *Sentencing Issues*

Under the Sentencing Guidelines, the base offense level for a violation of § 1014 is six. *See* U.S.S.G. § 2F1.1(a).[9] The district court determined that Glendale Federal had lost $659,326 in connection with Defendant's fraudulent activities and therefore increased the offense level by ten points under U.S.S.G. § 2F1.1(b)(1)(K). The district court further increased the offense level by two points because the offense involved more than minimal planning, *see* U.S.S.G. § 2F1.1(b)(2)(A), and by two points because Defendant was an "organizer, leader, manager, or supervisor" of another person during the commission of the offense, see U.S.S.G. § 3B1.1(c), resulting in a total adjusted offense level of 20. After declining to decrease

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[9] "Due to ex post facto considerations," the district court applied the 1990 Sentencing Guidelines, although Defendant was sentenced in 1999. Both parties concurred in that decision below, and neither party challenges the decision on appeal. Accordingly, we apply the same version of the Sentencing Guidelines, but express no view on the issue of what version of the Guidelines would apply here in the event of a dispute. All references in this opinion are to the 1990 version of the Guidelines.

the offense level based on Defendant's acceptance of responsibility, *see* U.S.S.G. § 3E1.1, the district court imposed the lowest possible sentence within the resulting Guideline range – 33 months.

Defendant contends that the district court erred in calculating the amount of loss caused by his offense, in increasing the offense level based on his supervision of the tax preparer, and in failing to reduce the offense level based on acceptance of responsibility. We review de novo the district court's interpretation of the Sentencing Guidelines, for clear error the district court's factual findings underlying the sentence imposed, and for abuse of discretion the district court's application of the Guidelines to a particular set of facts. *See United States v. Kohli*, 110 F.3d 1475, 1476-77 (9th Cir. 1997); *United States v. Barnes*, 125 F.3d 1287, 1290 (9th Cir. 1997).

1. *Amount of Loss*

"[I]n fraudulent loan application cases, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan." *United States v. Davoudi*, 172 F.3d 1130, 1135 (9th Cir. 1999) (internal quotation marks, ellipsis, and emphasis omitted). In this case, Glendale Federal recovered substantial amounts of the loaned funds by foreclosing on the loans and selling the properties that had been pledged as security. Nonetheless, Glendale Federal suffered large losses.

Defendant contends that the person whom the bank hired to sell the properties at issue engaged in criminal

misconduct that resulted in the properties' being sold at unreasonably low prices. In other words, Defendant argues that the intervening criminal acts of the foreclosure agent inflated the amount of loss suffered by Glendale Federal and that he should not have been punished based on the inflated loss amount.

The district court declined to hear evidence or make findings relating to Defendant's claim that the foreclosure agent was a thief, concluding, as a matter of law, based on our opinion in *Davoudi*, that the issue could be dealt with only through a motion for a downward departure. Further, because the court believed that the Guideline sentencing range that resulted from a consideration of Glendale Federal's total loss fairly reflected Defendant's culpability, it declined to depart downward on the basis of the foreclosure agent's alleged misconduct.

Davoudi does not control the question of intervening criminal misconduct, however. The defendant in that case did not claim that intervening criminal misconduct, unrelated in any manner to his own crime, inflated the losses suffered by the bank. Rather, in *Davoudi*, the defendant simply claimed that, because the assets at issue had decreased in value between the time his offense was discovered and the time the assets were sold, the district court should have used the higher pre-sale value when computing the loss suffered by the bank. We rejected his argument: "If the bank suffers losses after the offense is discovered because of a falling market or even through its own improvident management, those consequential losses can be attributed to the defendant's conduct for purposes of Guidelines sentencing." *Davoudi*, 172 F.3d at 1135.

Here, Defendant does not claim that the market fell, nor that the bank was improvident, nor even that the bank was grossly negligent. Rather, he contends that, after his crime was complete and fully discovered, a new criminal showed up and committed a different crime, inflicting new losses on the bank. As we understand Defendant's allegations, this case is no different than one in which, on the day of a planned foreclosure sale, an arsonist damages the bank's collateral.

The Guidelines' "relevant conduct" provision requires a defendant's sentence to be based on "all harm that resulted from the acts or omissions" of the defendant. U.S.S.G. § 1B1.3(a)(3). Like the other courts to consider this provision, we believe that the term "resulted from" establishes a causation requirement. *See United States v. Yeaman*, 194 F.3d 442, 457 (3d Cir. 1999) ("Section 1B1.3(a)(3) establishes a causation requirement when determining actual loss."); *United States v. Molina*, 106 F.3d 1118, 1123-24 (2d Cir. 1997) (holding that causation is established for purposes of U.S.S.G. § 1B1.3(a)(3) when the defendant "put into motion a chain of events that contained an inevitable tragic result" of the relevant harm) (internal quotation marks omitted); *United States v. Fox*, 999 F.2d 483, 486 (10th Cir. 1993) (holding that causation is established for purposes of § 1B1.3(a)(3) when the harm was a "direct result" or "flowed naturally" from the defendant's criminal misconduct); *see also United States v. Guillette*, 547 F.2d 743, 749 (2d Cir. 1976) ("We find the principle of proximate cause embodied in [18 U.S.C. § 241] through the phrase 'if death results.' ").

New losses inflicted independently by third-party criminals after the completion and discovery of a defendant's crime do not "result from" that crime for purposes of the Sentencing Guidelines, even if the defendant's conduct in some coincidental way was a but-for cause of the ultimate loss. *See generally* 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 3.12(c) & (f)(3) (1986 & Supp. 2000) (discussing proximate and intervening causes); *People v. Hernandez*, 624 N.E.2d 661, 666 (N.Y. 1993) ("When the intervening acts of another party are supervening or unforeseeable, the necessary causal chain is broken, and there is no liability for the [original actor]."); *State v. Munoz*, 659 A.2d 683, 692 (Conn. 1995) ("The doctrine of intervening cause, which has deep roots in the law of proximate cause, both criminal and civil . . . refers to a situation in which the defendant's conduct is a 'but for' cause, or cause in fact, of the victim's injury, but nonetheless some other circumstance subsequently occurs – the source of which may be an act of the victim, the act of some other person, or some nonhuman force – that does more than supply a concurring or contributing cause of the injury, but is unforeseeable and sufficiently powerful in its effect that it serves to relieve the defendant of criminal responsibility for his conduct.") (citations and footnote omitted). *See also United States v. Marlatt*, 24 F.3d 1005, 1007 (7th Cir. 1994) ("[There is a] difference between 'but for' causation and the causation – for which the presence of but-for causation is ordinarily a necessary condition but rarely a sufficient one – that imposes legal liability. The distinction runs throughout the law. Criminal law is no exception."); *United States v. Spinney*, 795 F.2d 1410, 1415 (9th Cir. 1986)

("A basic tenet of criminal law is that the government must prove that the defendant's conduct was the legal or proximate cause of the resulting injury.").

The government does not quarrel with this basic principle, but suggests that the district court need not determine the causation issue as part of the initial loss calculation. Rather, in the government's view, after the victim's "actual loss" has been computed, a defendant may move for a downward departure on the basis that an unforeseeable intervening force has increased the loss for which the defendant is being sentenced. That approach is flawed, however, because it improperly relieves the government of its obligation to prove by a preponderance of the evidence the amount of "harm that resulted from the acts or omissions" of the defendant. Under the Guidelines, the district court must determine the amount of loss caused by the defendant and the resultant Guidelines' sentencing range *before* considering whether to exercise its discretion to depart from that range. *See* U.S.S.G. § 1B1.1.

This case does not require us to define the outer boundaries of the Sentencing Guidelines' causation requirement. Our holding is a narrow one: For purposes of computing a fraud defendant's adjusted offense level under U.S.S.G. § 2F1.1, losses caused by the intervening, independent, and unforeseeable criminal misconduct of a third party do not "result[ ] from" the defendant's crime and may not be considered.

Because the district court heard no evidence and made no findings with respect to Defendant's allegations that the bank's losses were inflated by the intervening,

independent, and unforeseeable criminal misconduct of the foreclosure agent, we are unable to determine whether Defendant's sentence comports with the principles discussed above. Accordingly, we must vacate the sentence and remand for findings concerning the amount of loss caused by Defendant's offenses. Because we vacate the sentence and remand on this basis, we do not consider Defendant's other challenges to the district court's determination of the amount of loss.[10]

2. *Other Adjustments*

Defendant also challenges the district court's decision to increase his offense level by two points because he was an "organizer, leader, manager, or supervisor" of the tax preparer who concocted the Glendale returns. U.S.S.G. § 3B1.1(c). We review for clear error, *see United States v. Tank*, 200 F.3d 627, 633 (9th Cir. 2000), and find none. The record amply supports the district court's finding that Defendant, at the very least, supervised the tax preparer in creating the Glendale returns.

Finally, Defendant contends that the district court erred in refusing to decrease his offense level by two

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[10] The district court declined to resolve all the arguments presented by the parties concerning the appropriate items to be included in the loss calculation, because of the court's view that the sentencing range recommended by the presentence report "reasonably reflects the culpability of the Defendant in connection with these transactions." On remand, the district court should make specific findings as to the amount of loss before considering whether the resulting sentence accurately reflects Defendant's culpability.

points based on his acceptance of responsibility. We review for clear error, *United States v. Scrivener*, 189 F.3d 944, 947 (9th Cir. 1999), and again find none. Defendant presented a complex and elaborate defense, challenging both the legal validity of the government's theory of the case and his factual guilt. Although a defendant who goes to trial in order to challenge the legal validity of the government's theory may, in some cases, be eligible for a reduction of the offense level based on acceptance of responsibility, *see United States v. McKittrick*, 142 F.3d 1170, 1178 (9th Cir. 1998), the district court did not clearly err in concluding that this was not such a case.

CONCLUSION

We AFFIRM the judgment of conviction, but VACATE the sentence and REMAND for further sentencing proceedings consistent with this opinion.